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AMENDING SECTION 22 OF THE ORGANIC ACT OF GUAM

JULY 29 (legislative day, JULY 2), 1954.—Ordered to be printed

Mr. KUCHEL, from the Committee on Interior and Insular Affairs, submitted the following

REPORT

[To accompany H. R. 8634]

The Committee on Interior and Insular Affairs, to whom was referred the bill (H. R. 8634) to amend section 22 of the Organic Act of Guam, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

A hearing was held by the Subcommittee on Territorial and Insular Affairs, and a number of communications from citizens of Guam and other interested persons considered.

PURPOSE OF THE MEASURE

H. R. 8634 would amend subsection (b) of section 22 of the Organic Act of Guam (64 Stat. 389; found in 48 U. S. C., sec. 1424) to make indisputably clear the intent of Congress that the jury system should not be imposed upon the people of Guam without their consent as manifest by action of their popularly elected legislature.

Enactment of this measure, in the form approved by the House, has been urgently requested by the Governor of Guam, by the judge of the District Court of Guam in a personal visit to the chairman, by the Judicial Council of Guam, by Hon. Albert B. Maris, judge of the Third Circuit Court of Appeals, who has made a special study of the situation on Guam, and by the Department of the Interior. A report also has been received from the Department of Justice in which no objections to the measure were raised. Amendments recommended were adopted by the House and have been approved by your committee.

BACKGROUND OF THE LEGISLATURE

Guam had been Spanish for nearly three centuries prior to coming under the American flag in 1898 as a result of the war with Spain (30 Stat. 1754). The legal system at that time was of course based on

Spanish code law, of which our Anglo-Saxon jury system was not a part.

The Navy, under the administration of which Guam was placed, disturbed as little as possible the established Guamanian ways of life, and the legal system continued as before. When the organic act for Guam was under consideration in the 81st Congress, this committee held extensive hearings on the measure and the advisability of extending the jury system to Guam received specific attention. Upon the urging of members of the Guam Legislature and other spokesmen for the people of the Territory, requirement for indictment by grand jury and trial by petit jury were omitted from the act. In its report to the Senate, the committee stated:

> The bill of rights is modeled upon the Bill of Rights in the United States Constitution but does not expressly provide for trial by jury in Guam. Since Guamanians derive their tradition in law from Spain, a civil-law nation, they have little knowledge or experience in trial by jury. The Guam Congress could institute trial by jury if it so desired (S. Rept. 2109, to accompany H. R. 7273, 81st Cong.).

Your committee is informed that the popularly elected Guam Legislature has in fact considered adoption of the jury system, but after deliberation took no action. From the date of enactment of the organic act to the present, an accused has been placed on trial on an information rather than on grand jury indictment.

NEED FOR LEGISLATION

The urgent need for enactment of H. R. 8634, as pointed out in the cablegram of the Governor of Guam to the chairman, set forth below, is to prevent a wholesale jail delivery of Guamanian convicts, and to permit the continued administration of criminal justice on Guam in accordance with established procedures and the will of the people. The situation arises out of two very recent decisions of the United States Court of Appeals for the Ninth Circuit in the cases of *Pugh* v. *United States* and *Hatchett* v. *Government of Guam*. In opinions filed February 26, 1954, and March 30, 1954, respectively, the court reversed two felony convictions for the reason, in each case; namely, that the conviction was based upon an information and not upon an indictment. The Pugh case involved the violation of a law of the United States, while the Hatchett case concerned the violation of a law of Guam. The court so ruled assertedly because the Federal Rules of Criminal Procedure, made applicable to the District Court of Guam by section 22 (b), the section that would be amended by H. R. 8643, require in rule 7 that certain crimes be prosecuted by indictment unless indictment is waived.

The effect of the court's holding appears to be that all convictions of felonies heretofore had in the District Court of Guam may be set aside, upon appropriate motion of the defendant, unless indictment was earlier waived by him. A general jail delivery is therefore imminent unless H. R. 8634 is enacted. The subcommittee was informed that 35 convicted felons, now imprisoned pursuant to either Federal or local law, are potentially affected by the Pugh and Hatchett decisions; one of these convicted felons has had to be incarcerated in Alcatraz.

Also, the Legislature of Guam would be forced to enact legislation adopting a jury system foreign to their [illegible]. H. R. 8634 would do no more than per-

REPORTS OF EXECUTIVE AGENCIES

The reports of the Bureau of the Budget, the Department of the Interior, and the Department of Justice are set forth below. Also set forth are the communications of the Governor of Guam and of the Honorable Albert B. Maris, judge of the United States Court of Appeals for the Third Circuit.

EXECUTIVE OFFICE OF THE PRESIDENT,
BUREAU OF THE BUDGET,
Washington 25, D. C., July 20, 1954.

Hon. GUY CORDON,
Chairman, Committee on Interior and Insular Affairs,
United States Senate, Washington 25, D. C.

MY DEAR MR. CHAIRMAN: This is in response to your request for the views of the Bureau of the Budget on H. R. 8634, a bill to amend section 22 of the Organic Act of Guam.

The amendments to the Organic Act of Guam contained in the bill are proposed because of two recent decisions of the court of appeals for the ninth circuit holding that grand jury indictments are necessary in felony cases, and because one of the judges took the view that petit juries are also necessary.

The legal traditions of Guam are of Spanish origin, and the jury system has never been employed in the Territory. The legislative history of the Guam Organic Act seems to indicate clearly that Congress did not intend to require the use of juries, but wished to leave the matter entirely up to the Guamanian Legislature.

The recent court decisions appear to render invalid all felony convictions heretofore obtained in the District Court of Guam unless trial by jury was waived by the defendant. The effect will be a general jail delivery unless H. R. 8634 is enacted.

The Bureau of the Budget would have no objection to the enactment of this legislation.

Sincerely yours,

DONALD R. BELCHER,
Assistant Director.

DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington, D. C., May 11, 1954.

Dr. A. L. MILLER,
Chairman, Committee on Interior and Insular Affairs,
House of Representatives, Washington, D. C.

MY DEAR DR. MILLER: This will reply further to your request for the views of this Department on H. R. 8634, a bill to amend section 22 of the Organic Act of Guam.

I recommend that the bill be promptly enacted, with the amendments hereinafter indicated.

Section 22 of the Organic Act of Guam (48 U. S. C., sec. 1424) provides that the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure, among others, shall apply to the district court of Guam and to appeals therefrom. Section 1 of H. R. 8634 would amend that section to provide that no provision of any such rules which authorizes or requires indictment by a grand jury or trial by jury shall be applicable to the district court of Guam, unless and until made so applicable by the Legislature of Guam. Section 2 of H. R. 8634 provides that section 1 shall be deemed to be in effect as of August 1, 1950, the date of enactment of the Organic Act of Guam (64 Stat. 384, 48 U. S. C., sec. 1421 et seq.). Section 3 provides that no conviction of a defendant in a criminal proceeding in the district court of Guam prior to the date of enactment of the bill shall be reversed or set aside on the ground that the defendant was not indicted by a grand jury or tried by a petit jury.

Neither grand juries nor petit juries have ever been employed in Guam. Because the legal traditions of the Territory stem from Spain, a civil-law nation, the jury system is virtually unknown to the Guamanian people. Since juries have never [illegible] H. R. 8634 would do no more than per-

petuate the situation which now exists, and, in my opinion, clarify the intent of the Congress with respect to the use of juries in Guam.

Immediate enactment of the bill is required in the light of two recent decisions of the United States Court of Appeals for the Ninth Circuit. Very recently, in the cases of *Pugh* v. *United States* and *Hatchett* v. *Government of Guam*, in opinions filed February 26, 1954, and March 30, 1954, respectively, the Court of Appeals for the Ninth Circuit reversed two felony convictions for the reason, in each case, that the conviction was based upon an information and not upon an indictment. The Pugh case involved the violation of a law of the United States, while the Hatchett case concerned the violation of a law of Guam. Both cases arose in the District Court of Guam, which has certain local as well as Federal jurisdiction (48 U. S. C., sec. 1424 (a)). The court so ruled because the Federal Rules of Criminal Procedure, made applicable to the District Court of Guam by section 22 (b) of the organic act, require in rule 7 that certain crimes be prosecuted by indictment unless indictment is waived. The effect of the court's holding appears to be that all convictions of felonies heretofore had in the District Court of Guam may be set aside, upon appropriate motion of the defendant, unless indictment was earlier waived by him. A general jail delivery is therefore imminent unless H. R. 8634 is enacted. We are informed that 35 convicted felons, now imprisoned pursuant to either Federal or local law, are potentially affected by the Pugh and Hatchett decisions. It is clearly of critical importance that their release be prevented.

It is my view that the legislative history of the bill which became the Guam Organic Act (H. R. 7273, 81st Cong.), shows that the Congress, with the full concurrence of this Department, did not intend to provide for the use of grand juries or petit juries in Guam. This intention is shown, among other things, by the failure to provide for a jury trial in the organic act's bill of rights, or to provide for the application to the District Court of Guam of chapter 121 of title 28, United States Code, relating to the qualifications and manner of selecting jurors. The House and Senate committees considering the organic act appear to have considered that juries would not be used in Guam, for in their reports (H. Rept. 1677, 81st Cong., p. 13; S. Rept. 2109, 81st Cong., p. 13), they stated that:

"The bill of rights is modeled upon the Bill of Rights in the United States Constitution but does not expressly provide for trial by jury in Guam. Since Guamanians derive their tradition in law from Spain, a civil-law nation, they have little knowledge or experience in trial by jury. The Guam Congress could institute trial by jury if it so desired."

Because doubt subsequently arose as to whether this result had clearly been achieved, a section was included (sec. 35 (b)) in H. R. 6808 of the 82d Congress, the Guam omnibus bill, which would have clarified this point. Section 35 (b) of H. R. 6808 carried precisely the provision of section 1 of H. R. 8634. This Department reported favorably upon the bill in a letter to former Chairman Murdock, of the House Interior and Insular Affairs Committee, dated May 9, 1952, in which particular note was taken of section 35. H. R. 6808 failed of enactment, however.

Because of the Guamanians' civil-law heritage, it seems to me entirely desirable to refrain from requiring jury trials in the Territory. This is especially so, I think, so long as it is made clear, as H. R. 8634 would do, that jury trials could be instituted in the District Court of Guam at whatever time the Guam Legislature should choose. It should be noted that the constitutional guaranties of indictment by grand jury and trial by jury do not apply to Guam, since it is an unincorporated Territory. We have examined the bill in the light of other constitutional questions which might be raised with respect to it and have concluded that it is unobjectionable on any such ground.

I appreciate that the Pugh and Hatchett cases do not hold that petit juries are required in the District of Guam. It is therefore not of as pressing importance that the law be clarified in this respect as it is in the case of grand juries. I think, it desirable, however, for H. R. 8634 to make reference to both grand and petit juries, in order to avoid any subsequent argument on this point.

I suggest, however, that H. R. 8634 be amended in two particulars. First, there is a danger that the Hatchett decision may be interpreted to exclude attorneys for the Government of Guam from prosecuting persons in the District Court of Guam for violations of the laws of Guam. It has thus far been the practice in the District Court of Guam for the United States attorney or his assistant to prosecute in Federal cases, but for attorneys for the Government of Guam to prosecute for violations of Territorial law. This arrangement, in my opinion, is efficient and sound. But the statement in the Hatchett case that "but a single system of procedure is to be followed in respect to [all types of cases in the District

Court of Guam," casts doubt upon the correctness of such a division of the caseload, as do references in the Federal Rules of Criminal Procedure to the "United States attorney" and "attorneys for the government," the latter term being defined in rule 54 (c) so as to exclude attorneys for the Government of Guam. In order that Territorial legal officers may continue to act with respect to Territorial, as opposed to Federal, matters, I recommend that the bill be amended by striking out the words "Legislature of Guam.' ", on page 1, line 11, and inserting in lieu thereof the following:

"Legislature of Guam, and except further that the terms 'attorney for the government' and 'United States attorney', as used in the Federal Rules of Criminal Procedure, shall, when applicable to cases arising under the laws of Guam, mean the Attorney General of Guam or such other person or persons as may be authorized by the laws of Guam to act therein."

Secondly, although this Department considers that no serious question exists concerning the validity of H. R. 8634, I nonetheless believe that it would be desirable to add a separability clause. I therefore recommend that a new section 4 be added on page 2 of the bill, immediately following line 6, such section to read as follows:

"SEC. 4. If any particular provision of this Act, or the application thereof to any person or circumstance, is held invalid, the remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby."

I hope very much that your committee will adopt these two amendments and that H. R. 8634 will be enacted promptly.

The Bureau of the Budget has advised that there is no objection to the submission of this report.

Sincerely yours,

ORME LEWIS,
Assistant Secretary of the Interior.

DEPARTMENT OF JUSTICE,
OFFICE OF THE DEPUTY ATTORNEY GENERAL,
Washington, May 26, 1954.

Hon. A. L. MILLER,
Chairman, Committee on Interior and Insular Affairs,
House of Representatives, Washington, D. C.

DEAR MR. CHAIRMAN: This is in response to your request for the views of the Department of Justice relative to the bill (H. R. 8634) to amend section 22 of the Organic Act of Guam.

Section 1 of the bill would amend section 22 of the Organic Act of Guam so as to make unnecessary trial by jury or the prosecution of offenses by indictment by a grand jury in the District Court of Guam unless and until so authorized by laws enacted by the Legislature of Guam.

Section 2 of the bill would make the amendment provided for in section 1 effective as of August 1, 1950.

Section 3 would provide that no conviction of a defendant in a criminal proceeding in the District Court of Guam heretofore had shall be reversed or set aside on the ground that the defendant was not indicted by a grand jury or tried by a petit jury.

The use of juries in Guam is not required by the Constitution. The Supreme Court has held that Congress may deny the right to grand jury indictment and petit jury trial in courts for unincorporated territories of the United States (see *Balzac* v. *Porto Rico*, 258 U. S. 298). Guam has not been incorporated into the United States. The bill of rights for Guam, contained in the organic act (48 U. S. C. 1421–1424), is modeled on the Bill of Rights of the United States Constitution, but deliberately excludes the provisions guaranteeing grand and petit juries. The explanation given for this in the legislative reports on the organic act was that "* * * Guamanians derive their tradition in law from Spain, a civil law nation, [and hence] they have little knowledge or experience in trial by jury. The Guam Congress could institute trial by jury if it so desired" (S. Rept. 2109, 81st Cong., 2d sess., p. 13). The inference that it was not intended to have juries in Guam is strengthened by the fact that there was no adoption of the provisions of the Judicial Code for selecting grand and petit jury panels, although other sections of the Judicial Code were explicitly incorporated.

The proposed amendments to the Organic Act of Guam contained in the bill have been thought necessary because of two recent decisions of the Court of

Appeals for the Ninth Circuit holding that grand jury indictments are necessary in felony cases, and because one of the judges of that court (Chief Judge Denman) took the view that petit juries are also necessary (*Pugh* v. *United States*, and *Hatchett* v. *Guam*, decided March 30, 1954). The basis for the court's decision is that the Organic Act of Guam provides for a district court with jurisdiction of a district court of the United States as such court is defined in section 451 of title 28, United States Code, and original jurisdiction in all other causes in Guam which has not been transferred by the legislature to other court or courts established by it (48 U. S. C. 1424). The organic act also provides that the rules promulgated by the Supreme Court of the United States for the trial of civil, criminal, admiralty, and bankruptcy cases (28 U. S. C. 2072; 18 U. S. C. 3771, 3772; 28 U. S. C. 2073; 11 U. S. C. 53) shall apply to the District Court of Guam. The Court of Appeals determined that since the rules to be applied in the District Court of Guam were the Federal Rules of Criminal Procedure, and those rules explicitly require indictments in felony cases, it is necessary to proceed in felony cases in the District Court of Guam by way of grand jury indictment. Although the majority of the court ruled that a petit jury must be provided only when "required by law," Chief Judge Denman took the separate view that so long as the District Court of Guam was given the "jurisdiction" of a United States district court, it was required to be in all major respects the same as any other such court, which meant that grand and petit juries were mandatory in felony cases if the defendant chose.

The first section of the proposed amendment would make clear that the decision of the ninth circuit in this matter would not have prospective effect. The use of grand and petit juries would not be mandatory in Guam, but if the Legislature of Guam desires to institute those procedures it can do so.

Section 2 of the bill would provide, in effect that persons who have already committed offenses but have not been charged, may be proceeded against by information, as has been the practice in Guam. Section 3 would provide, on the other hand, that those who have already been proceeded against by way of information and trial without a jury, rather than indictment and jury trial, cannot use such fact as a basis for attack on their convictions by appeal or collaterally. Thus sections 2 and 3 have retrospective effect.

Whether the bill should be enacted involves a question of policy concerning which this Department prefers to make no recommendation. However, with respect to sections 2 and 3, in view of the doubt that may be raised as to their validity because of their retrospective effect, the committee, if it gives favorable consideration to the provisions in question, may desire to include a severability clause in the bill.

The Bureau of the Budget has advised that there is no objection to the submission of this report.

Sincerely,

WILLIAM P. ROGERS,
Deputy Attorney General.

WASHINGTON, D. C., *July 25, 1954.*

Senator GUY CORDON,
United States Senate, Washington, D. C.

Would appreciate knowing status of H. R. 8634, grand jury bill, passage in Senate before adjournment. Most important here. If it fails of passage I am forced to call special session to enact grand-jury legislation with many attendant problems involved, making administration of this government very difficult. Furthermore, failure will operate to open jail to indefinite number of prisoners. Hope you can give matter personal attention. Thank you.

FORD Q. ELVEDGE,
Governor of Guam, the Marianas.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT,
Philadelphia 7, Pa., March 29, 1954.

Hon. GUY CORDON,
Chairman, Subcommittee on Territories and Insular Affairs,
Committee on Interior and Insular Affairs,
United States Senate, Washington, D. C.

DEAR SENATOR CORDON: When the Organic Act of Guam was enacted by the 81st Congress in 1950 it was the clear legislative intent not to impose the jury

system upon the island except by action of the insular legislature. This was expressly stated in the committee reports in both Houses in identical language, as follows:

"The bill of rights is modeled upon the Bill of Rights in the United States Constitution but does not expressly provide for trial by jury in Guam. Since Guamanians derive their tradition in law from Spain, a civil-law nation, they have little knowledge or experience in trial by jury. The Guam Congress could institute trial by jury if it so desired" (H. Rept. 1677, 81st Cong., 2d sess., p. 13; S. Rept. 2109, 81st Cong., 2d sess., p. 13).

Section 22 (b) of the organic act, however, made the Federal Rules of Criminal and Civil Procedure applicable to the District Court of Guam. Among these is criminal procedure rule 7 which requires felonies to be prosecuted by indictment by a grand jury unless indictment is waived.

Likewise there are a number of provisions in both the civil and criminal rules which at least contemplate trial by jury. It seems clear that in applying these procedural rules to the District Court of Guam, Congress did not intend by implication to impose the jury system in Guam, in the face of the contrary intent expressed in the committee reports. However, a doubt on this point has arisen. The District Court of Guam in *United States* v. *Seagraves* (1951, 100 F. Supp. 424) and *United States* v. *Pugh* (1952, 106 F. Supp. 209; appeal dismissed, 197 F. 2d 509) held that the organic act does not require indictment by grand jury or trial by petit jury in that court. Quite recently, however, the United States Court of Appeals for the Ninth Circuit has reversed the denial by the district court of a motion under section 2255 of title 28 by the defendant in the Pugh case to set aside his conviction of a felony, holding, as I am informed, that the defendant whose prosecution was begun by information should have been indicted by a grand jury under criminal procedure rule 7. One of the judges of the court of appeals also held, I understand, that trial by jury should have been given. This means, of course, if the decision stands, that it will be necessary to empanel grand juries in the island hereafter and that convictions of felonies heretofore had in the district court must all be set aside unless indictment was waived by the defendant.

My investigation of the judicial affairs of Guam made on the island at the request of the Government of Guam during 7 weeks in the summer of 1951 fully convinced me that Congress was entirely right in not desiring to impose the jury system in Guam at this time. I would, therefore, suggest the urgent importance of enacting a clarifying amendment of section 22 (b) of the organic act to remove the present ambiguity and carry out the congressional intent in this matter. I believe that the power of Congress to do so is clear. For in *Balzac* v. *People of Porto Rico* (1922, 258 U. S. 298), it was settled that the constitutional guaranties of indictment by grand jury and trial by jury do not apply to an unincorporated territory. Indeed the Balzac case is peculiarly applicable to Guam since both Puerto Rico and Guam were acquired from Spain by the Treaty of Paris and both had the same civil-law background. Accordingly in Guam prosecution by information rather than by indictment and trial by the court rather than by a jury are simply matters of criminal procedure optional with Congress, of remedy and not of right. It follows, I believe, that since Congress could (as it undoubtedly thought that it did) authorize the prosecution of felonies in Guam upon information and their trial by the court it can now amend the law retrospectively so as to eliminate these alleged procedural defects in the case of felonies heretofore tried (see *Charlotte Harbor Ry.* v. *Welles* (1922, 260 U. S. 8, 11)) by declaring the failure to prosecute by indictment and to try by jury in these cases to be immaterial to the validity of a conviction. (See *Mattingly* v. *District of Columbia* (1878, 97 U. S. 687); *Goddard* v. *Frazier* (10 Cir. 1946, 156 F. 2d 938, cert. den. 329 U. S. 765.))

A draft bill to accomplish this object is enclosed for your consideration.

Sincerely yours,

ALBERT B. MARIS.

UNITED STATES COURT OF APPEALS,
FOR THE THIRD CIRCUIT,
Philadelphia 7, Pa., April 5, 1954.

Hon. GUY CORDON,
Chairman, Subcommittee on Territories and Insular Affairs,
Committee on Interior and Insular Affairs,
United States Senate, Washington, D. C.

DEAR SENATOR CORDON: Supplementing my letter of March 29 transmitting to you a draft bill to clarify the Organic Act of Guam with respect to indictment by grand jury and trial by petit jury I have now had opportunity to examine

the opinions of the Court of Appeals for the Ninth Circuit in the cases of *Bartholomew Moffett Pugh, Jr.* v. *United States of America*, decided February 26, 1954, and *George B. Hatchett* v. *The Government of Guam*, decided March 30, 1954.

In the Pugh case the defendant had been convicted in the District Court of Guam upon an information charging a felony under the laws of the United States. The majority opinion filed by Judge Pope holds that the constitutional right to indictment by a grand jury does not apply to Guam, since it is an unincorporated territory, and that the "requirement of a grand jury is simply a statutory provision, brought about by section 22 (b) [of the organic act] incorporating by reference criminal rule 7 (a)." Holding that the lack of indictment was a matter which could be raised on a motion under section 2255 of title 28, United States Code, the court of appeals reversed the judgment of conviction and remanded with directions to dismiss the information.

In the Hatchett case the defendant had been convicted in the district court after a trial by the court upon an information charging a felony under the local law of Guam. The defendant contended on appeal that he was entitled to be tried by a jury under the sixth amendment. The majority opinion, also filed by Judge Pope, held that the sixth amendment did not apply to Guam and that there is no requirement either in the organic act or any other act of Congress or in the Federal Rules of Criminal Procedure that criminal cases, whether arising under Federal or local law, must be tried by jury in the District Court of Guam. However, since the prosecution of the felony had been begun by information instead of by indictment the conviction was reversed.

In both cases Chief Judge Denman, while concurring in the holding that indictment by a grand jury was required, placed his conclusion upon a different ground, taking the view that the district court was without jurisdiction to proceed by information. In the Hatchett case he dissented from the holding that jury trial is not required in Guam in criminal cases, his view being that the district court is without jurisdiction to try a criminal case except with a jury, unless waived.

It thus appears that the court of appeals has definitely held that felonies must be prosecuted in Guam by indictment by a grand jury, unless waived, but that trial by petit jury is not required by existing law. The effect of the court's holding is that all convictions of felonies heretofore had in the District Court of Guam may now be set aside on motion of the defendant under section 2255 of title 28, unless he has expressly waived indictment. A general jail delivery is thus imminent unless legislation is promptly passed by Congress to eliminate the present inadvertent requirement of indictment. In view of the court's holding that petit juries are not required the establishment of grand jury procedure in Guam would certainly be useless, burdensome, and indefensible. Also in view of that holding it may well be that the last six words of the draft bill submitted to you with my letter of March 29—"or tried by a petit jury"—are unnecessary and should be omitted.

Sincerely yours,

ALBERT B. MARIS.

CORDON RULE (CHANGES IN EXISTING LAW)

In compliance with the Cordon rule (subsec. (4) of rule XXIX of the Standing Rules of the Senate), changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics, existing law in which no change is proposed is shown in roman):

SECTION 22 (b) OF THE ORGANIC ACT OF GUAM (64 STAT. 389)

(b) The rules heretofore or hereafter promulgated and made effective by the Supreme Court of the United States pursuant to section 2072 of title 28, United States Code, in civil cases; section 2073 of title 28, United States Code, in admiralty cases; sections 3771 and 3772 of title 18, United States Code, in criminal cases; and section 30 of the Bankruptcy Act of July 1, 1898, as amended (title 11, U. S. C., sec. 53), in bankruptcy cases; shall apply to the District Court of Guam and to appeals therefrom [.]*; except that no provisions of any such rules which authorize or require trial by jury or the prosecution of offenses by indictment by a grand jury instead of by information shall be applicable to the District Court of Guam unless and until made so applicable by laws enacted by the Legislature of Guam, and except further that the terms "attorney for the government" and "United States attorney", as used in the Federal Rules of Criminal Procedure, shall, when applicable to cases arising under the laws of Guam, mean the Attorney General of Guam or such other person or persons as may be authorized by the laws of Guam to act therein.*

APPENDIX

THE LIBRARY OF CONGRESS,
LEGISLATIVE REFERENCE SERVICE,
AMERICAN LAW DIVISION,
Washington 25, D. C., June 22, 1954.

To: Senate Interior and Insular Affairs Committee (attention of Senator Guy Cordon).
Subject: H. R. 8634.

Guam is an unincorporated territory (64 Stat. 384; 48 U. S. C. 1421a). It was governed by Spanish civil law prior to its acquisition by the United States. It has never used and is not required by the Constitution of the United States to employ the jury system, either with respect to indictment by grand jury or trial by petit jury (*Balzac* v. *Porto Rico* (1922), 258 U. S. 298, 304–313; *United States* v. *Seagraves* (D. C. Guam, 1951; 100 F. Supp. 424, 425); *Government of Guam* v. *Pennington* (D. C. Guam, 1953; 114 F. Supp. 907, 909); see also *Ocampo* v. *United States* (1914), 234 U. S. 91, 98; *Dorr* v. *United States* (1903), 195 U. S. 138, 149.)

Congress did not intend that the Organic Act of Guam (64 Stat. 384, et seq.; 48 U. S. C. 1421 et seq.) would require the use of the jury system (H. Rept. 1677, 81st Cong., p. 13; S. Rept. 2109, 81st Cong., p. 13, cf. p. 3; 96 C. R. 11382 (July 31, 1950)). The bill of rights in the act did not include any mention of a right to a grand or petit jury (48 U. S. C. 1421b). Nor did the act provide for juries being selected or convened. The bill (H. R. 7273, 81st Cong.) as passed by the House provided for a Guam judicial system headed by a supreme court subject to Guam law (96 C. R. 7576). At least partly for reasons of economy (Senate Report, supra, p. 3), Senate committee amendments, which were concurred in by the Senate, substituted for that court a United States district court (subject to the Rules of Criminal Procedure), "doing away with two judges" (96 C. R. 11382).

However, in two as yet unreported cases, the United States Court of Appeals for the Ninth Circuit held felony convictions in Guam invalid unless based on grand jury indictment (*Pugh* v. *United States* (U. S. C. A. 9 C, February 26, 1954) reviewing *United States* v. *Pugh* (D. C. Guam 1952), 106 F. Supp. 209, and *Hatchett* v. *Government of Guam* (U. S. C. A. 9 C, March 30, 1954); contra: *United States* v. *Seagraves, supra*, and *Government of Guam* v. *Pennington, supra*).

A letter dated May 11, 1954 to the chairman, House Committee on Interior and Insular Affairs, printed in House Report 1764, 83d Congress, page 3, states: "The court so ruled because the Federal Rules of Criminal Procedure, made applicable to the District Court of Guam by section 22 (b) of the organic act [48 U. S. C. 1424 (b)], require in rule 7 that certain crimes be prosecuted by indictment unless indictment is waived. The effect of the court's holding appears to be that all convictions of felonies heretofore had in the District Court of Guam may be set aside, upon appropriate motion of the defendant, unless indictment was earlier waived by him."

(Because the chief judge expressed an opinion not necessary to the decision in the Hatchett case that a jury trial was also necessary, the curative bill (H. R. 8634) is so drawn as to authorize convictions without petit juries as well as those not based on grand jury indictments.)

In order to validate criminal proceedings conducted since the enactment of the organic act, August 1, 1950, the bill is retrospective as well as prospective. If the Pugh and Hatchett decisions are allowed to stand in spite of the arguments against their correctness (see *Hawaii* v. *Mankichi* (1903), 190 U. S. 197, at 209, 212), the question may be raised in other cases whether or not this statute would be invalid as an ex post facto law.

The prohibition against such laws contained in the Guam Organic Act (64 Stat. 385; 48 U. S. C. 1421b (j)) obviously does not restrict the Congress of the United States.

The Federal Constitution's protection against ex post facto laws (art. I, sec. 9, clause 3) has been said to apply even where juries have been held not to be constitutionally required (*Dorr* v. *United States* (1904) 195 U. S. 138, 142, and cases [illegible] Congress shall see fit to incorporate territory ceded by treaty into the United States, we regard it as settled * * * that the territory is to be

governed under the power existing in Congress to make laws for such territories and subject to such constitutional restrictions upon the powers of that body as are applicable to the situation" (Id., 143: see *Balzac* v. *Porto Rico*, *supra*, at p. 312, and *Alton* v. *Alton* (C. C. A. 3, 1953) 207 F. 2d 667, 670, note 8).

An ex post facto law was defined by Mr. Justice Chase in the much cited case of *Calder* v. *Bull* ((1798) 3 Dall. 386, 390) as "First, every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. Second, every law that aggravates a crime, or makes it greater than it was, when committed. Third, every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. Fourth, every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offense, in order to convict the offender * * * Every ex post facto law must necessarily be retrospective; but every retrospective law is not an ex post facto law." In *Kring* v. *Missouri* ((1882) 107 U. S. 221), the court, in reversing a first-degree-murder conviction on the ground that under a prior law defendant had been in jeopardy when he pleaded guilty to second degree murder and could not have been tried again, extended this definition perhaps farther than the cases support, saying at pages 228–229:

"An ex post facto law is one * * * in short, which in relation to the offense or its consequences, alters the situation of a party to his disadvantage."

Where the constitutional guaranty of a jury trial in a State or in an incorporated territory means a right to a jury of 12, a law made after the crime which reduced the jury to 8, was an invalid ex post facto law (*Thompson* v. *Utah* (1898), 170 U. S. 343; see also *Springville* v. *Thomas* (1897), 166 U. S. 707, *American Publishing Co.* v. *Fisher* (1897), 166 U. S. 464).

However, a statute changing an absolute right to severance, after joint indictment, to a privilege resting in the discretion of the trial court was held not to be an ex post facto law (*Beazell* v. *Ohio* (1925), 269 U. S. 163). As Mr. Justice Stone said, at pages 170–171:

"But the statute of Ohio here drawn in question affects only the manner in which the trial of those jointly accused shall be conducted. It does not deprive the plaintiffs in error of any defense previously available, nor affect the criminal quality of the act charged. Nor does it change the legal definition of the offense or the punishment to be meted out. The quantum and kind of proof required to establish guilt, and all questions which may be considered by the court and jury in determining guilt or innocence, remain the same.

"Expressions are to be found in earlier judicial opinions to the effect that the constitutional limitation may be transgressed by alterations in the rules of evidence or procedure. (See *Calder* v. *Bull*, 3 Dall. 386, 390; *Cummings* v. *State of Missouri*, 4 Wall. 277, 326; *Kring* v. *Missouri*, 107 U. S. 221, 228, 232.) And there may be procedural changes which operate to deny to the accused a defense available under the laws in force at the time of the commission of his offense, or which otherwise affect him in such a harsh and arbitrary manner as to fall within the constitutional prohibition (*Kring* v. *Missouri*, 107 U. S. 221; *Thompson* v. *Utah*, 170 U. S. 343). But it is now well settled that statutory changes in the mode of trial or the rules of evidence, which do not deprive the accused of a defense and which operate only in a limited and unsubstantial manner to his disadvantage, are not prohibited. A statute which, after indictment, enlarges the class of persons who may be witnesses at the trial, by removing the disqualification of persons convicted of felony, is not an ex post facto law (*Hopt* v. *Utah*, 110 U. S. 574). Nor is a statute which changes the rules of evidence after the indictment so as to render admissible against the accused evidence previously held inadmissible (*Thompson* v. *Missouri*, 171 U. S. 380); or which changes the place of trial (*Gut* v. *The State*, 9 Wall. 35); or which abolishes a court for hearing criminal appeals, creating a new one in its stead. (See *Duncan* v. *Missouri*, 152 U. S. 377, 382.)

"Just what alterations of procedure will be held to be of sufficient moment to transgress the constitutional prohibition cannot be embraced within a formula or stated in a general proposition. The distinction is one of degree. But the constitutional provision was intended to secure substantial personal rights against arbitrary and oppressive legislation (see *Malloy* v. *South Carolina*, 237 U. S. 180, 183) and not to limit the legislative control of remedies and modes of procedure which do not affect matters of substance. (See *Gibson* v. *Mississippi*, 162 U. S. 565, 590; *Thompson* v. *Missouri*, *supra*, 386; *Mallett* v. *North Carolina*, 181 U. S. 589, 597.)"

And the majority rule is that a statute retrospectively substituting an information for an indictment (which was the required procedure when the crime was committed) is not invalid as an ex post facto law (*Campbell* (1851),

59 Calif. 243, 43 Am. Rep. 257; *Sage* v. *State* (1891), 127 Ind. 15, 26 N. E. 667; *State* v. *Kyle* (1901), 166 Mo. 287, 56 L. R. A. 115, 65 S. W. 763; *State* v. *Parks* (1901); 165 Mo. 496, 65 S. W. 1132 (4); *Lybarger* v. *State* (1891), 2 Wash. 552, 27 Pac. 449 (rehearing denied, 27 Pac. 1029; appeal dismissed under rule 10 (1895), 163 U. S. 693 (1)); *State* v. *Hoyt* (1892), 4 Wash. 818, 30 Pac. 1060; *In re Wright* (1891), 3 Wyo. 478, 13 L. R. A. 748, 31 Am. St. Rep. 94, 27 Pac. 565. Contra: *State* v. *Kingsly* (1891), 10 Mont. 537, 26 Pac. 1066; *Garnsey* v. *State* (1910), 4 Okla. Crim. Rep. 547; 38 L. R. A. (N. L.) 600, 112 Pac. 24; *State* v. *Rock* (1899), 20 Utah 38, 57 Pac. 532). In these three contra cases, the ex post facto clause of the Federal Constitution was clearly applicable because the territory had been incorporated into the United States.

Guam is not an incorporated territory. The Congress did not intend it to have a jury system. An unexpected application of a jury requirement among general procedural rules (referred to by the organic act) is the only basis for the retroactive right to a jury system. Congress may be free to apply an ex post facto law to Guam to correct the error. Such a statute substituting retroactively an information for a grand jury indictment does not appear to be an ex post facto law under the majority rule. Consequently, it appears unlikely that H. R. 8634 could be successfully attacked in the courts.

NOTE.—It is suggested that section 2 be revised so as to refer, not to "August 1, 1950" but to the effective date of section 22 of the Organic Act of Guam (64 Stat. 384, 389–390). Besides making clear the reason for the retrospective feature of the act, this change would dovetail with the organic act which, although approved August 1, 1950 (64 Stat. 393), contains the following provision concerning the act's coming into effect:

"SEC. 34. Upon the 21st day of July 1950, the anniversary of the liberation of the island of Guam by the Armed Forces of the United States in World War II, the authority and powers conferred by this Act shall come into force. However, the President is authorized, for a period not to exceed one year from the date of enactment of this Act, to continue the administration of Guam in all or in some respects as provided by law, Executive order, or local regulation in force on the date of enactment of this Act. The President may, in his discretion, place in operation all or some of the provisions of this Act if practicable before the expiration of the period of one year (Id., 383)."

It is just possible that there was a defendant charged by information during the period July 21 to August 1, 1950, and that he might otherwise be able to set aside his conviction.

CARLILE BOLTON-SMITH.

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Public Law 229 - 83d Congress
Chapter 383 - 1st Session
S. J. Res. 6

JOINT RESOLUTION

To provide for a continuance of civil government for the Trust Territory of the Pacific Islands.

Whereas, pursuant to the authority of Public Law 204, Eightieth Congress, of July 18, 1947, the President approved the trusteeship agreement for the Trust Territory of the Pacific Islands between the United States and the United Nations, effective July 18, 1947; and 61 Stat. 397.

Whereas responsibility for civil administration of the Trust Territory was vested in the Secretary of the Navy by Executive Order Numbered 9875 of July 18, 1947; and 3 CFR, 1947 Supp., p. 160.

Whereas responsibility for such civil administration was transferred to the Secretary of the Interior, effective July 1, 1951, by Executive Order Numbered 10265 of June 29, 1951; and 48 USC note prec. 1451.

Whereas organic legislation for the Trust Territory is now pending before the Congress: It is hereby 67 Stat. 494, 67 Stat. 495.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That until June 30, 1954, all executive, legislative, and judicial authority necessary for the civil administration of the Trust Territory of the Pacific Islands shall continue to be vested in such person or persons and shall be exercised in such manner and through such agency or agencies as the President of the United States may direct or authorize. Trust Territory of Pacific Islands. Civil government.

SEC. 2. There are hereby authorized to be appropriated for a period not to exceed one year such sums, not to exceed $7,500,000, as may be necessary to carry out the provisions of this joint resolution: *Provided, however*, That no new activity requiring expenditures of Federal funds shall be initiated without specific prior approval of the Congress. Appropriation.

SEC. 3. Notwithstanding the provisions of the Interior Department Appropriation Act, 1953 (Public Law 470, Eighty-second Congress, second session, 66 Stat. 445), the Island Trading Company of Micronesia shall not have succession after December 31, 1954. Island Trading Company of Micronesia.

Approved August 8, 1953.

GPO 862240